Supreme Court, U.S.
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No. 92-1635

IN THE SUPREME COURT
OF THE UNITED STATES

October Term 1992

LOUISVILLE AND JEFFERSON COUNTY
METROPOLITAN SEWER DISTRICT
PETITIONER

V.

UNITED STATES OF AMERICA,
COMMONWEALTH OF KENTUCKY,
NATURAL RESOURCES AND
ENVIRONMENTAL PROTECTION CABINET
RESPONDENTS

On Petition for Writ of Certiorari
to the United States Court of Appeals
For the Sixth Circuit

BRIEF FOR THE RESPONDENT KENTUCKY IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Brenda Gail Lowe
Department of Law
Natural Resources and
Environmental Protection Cabinet
Fifth Floor, Capital Plaza Tower
Frankfort, Kentucky 40601
(502)564-5576

COUNTERSTATEMENT OF THE QUESTION PRESENTED

I. Did the District Court abuse its discretion in setting aside a consent decree involving three governmental entities?

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BRIEF FOR THE RESPONDENT IN KENTUCKY OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

The Respondent, Commonwealth of Kentucky, respectfully submits the Petition for Writ of Certiorari should be denied for the reasons stated herein.

OPINIONS BELOW

1. Order entered by Chief Judge, Thomas A. Ballantine, Jr., of the United States District Court for the Western District of Kentucky at Louisville in the matter of the *United States of America and City of Louisville v. Louisville and Jefferson County Metropolitan Sewer District*, Civil Action No. C 78-0130-L(B), entered July 3, 1991.

2. Memorandum entered by Chief Judge, Thomas A. Ballantine, Jr., of the United States District Court for the Western District of Kentucky at Louisville in the matter of the *United States of America and City of Louisville v. Louisville and Jefferson County*

Metropolitan Sewer District, Civil Action No. C 78-0130-L(B), entered November 8, 1991.

3. Order entered by Chief Judge, Thomas A. Ballantine, Jr., of the United States District Court for the Western District of Kentucky at Louisville in the matter of the *United States of America and City of Louisville v. Louisville and Jefferson County Metropolitan Sewer District*, Civil Action No. C 78-0130-L(B), entered November 8, 1991.

4. Mandate entered by the United States Court of Appeals for the Sixth Circuit on appeal from the United States District Court for the Western District of Kentucky in the matter of the *United States of America*

and City of Louisville v. Louisville and Jefferson County Metropolitan Sewer District and Commonwealth of Kentucky, Civil Action No. 91-6461, entered January 12, 1993.

Entered as Mandate March 23, 1993.

5. Order denying Petition for Rehearing and Rehearing En Banc entered by the United States Court of Appeals for the Sixth Circuit in the matter of the *United States of America and City of Louisville v. Louisville and Jefferson County Metropolitan Sewer District and Commonwealth of Kentucky*, Civil Action No. 91-6461, entered March 12, 1993.

JURISDICTION

Petitioner's application to invoke the jurisdiction of this Court has fulfilled the initial requirements of 28 U.S.C. §1257(3). Respondent submits, nevertheless, that petitioner's application for writ of certiorari should be denied since the issues presented therein do not comply with the prerequisites of Supreme Court Rule 10.

As stated in Rule 10 of the Supreme Court Rules, the granting of a review on a petition for writ of certiorari is purely within the discretion of the Court. Ordinarily a writ will be granted only where there are special and important reasons therefor. See *Hardin v. Kentucky Utilities Company*, 390 U.S. 1 (1968); *United States v. Oregon*, 366 U.S. 643 (1961); and *Rudolph v. United States*, 370 U.S. 269 (1962).

In order to fully apprise this Court as to the nature of the issue involved, the respondent will demonstrate the rule has not been satisfied. A review of this argument by the Court will demonstrate the validity of the respondent's contention that the granting of the application for writ of certiorari is not desirable.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Clean Water Act, 33 U.S.C. §1251 *et seq.*

COUNTERSTATEMENT OF THE CASE

This case involves the interpretation of a particular agreement entered into among three governmental institutions, Petitioner, the Louisville and Jefferson County Metropolitan Sewer District, (hereinafter MSD), and the United States of America and the Commonwealth of Kentucky, respondents. (Appendix of Kentucky (A.K.) B.p.2) At issue is the Morris Forman Treatment Plant, the largest sewage treatment plant in the Commonwealth of Kentucky, which treats the waste water of Kentucky's largest city, Louisville. The effluent from the plant (105 million gallons per day) (A.K. p.B.2) is discharged into the Ohio River and sent on its way to the drinking water supplies of points south too numerous to mention. In 1972 Congress passed the Federal Water Pollution Control Act, now evolved into

the Clean Water Act, found at 33 U.S.C. §1251 *et seq*. That Act, of course, regulates the discharge of sewage into the waters of the United States. In 1978, fifteen (15) years ago, the Morris Forman Treatment Plant was out of compliance with the Clean Water Act, and its permit limits under that Act, and the United States through its Environmental Protection Agency sought to bring the plant into compliance. The mechanism that was utilized was a 1981 consent decree. (A.K. p.B.4) The focus of this action is the interpretation of the consent decree.

This action had been originally brought in April 1978 seeking civil penalties against MSD for violation of effluent limitations imposed by its discharge permit. Under the consent decree, MSD was to bring the plant into compliance with the Clean Water Act

through a program of corrective action and improvements. (A.K. p.B.4,5) The decree provided for protection to MSD against exposure to fines for violation of the Clean Water Act while MSD was attempting to come into compliance. MSD came into compliance with the limits in the permit in 1986, but the plant at that time was not at full capacity for treating wastewater. (A.K. p.B.7) The United States then moved to terminate the protections of the consent decree, arguing that since the plant was in compliance, the purpose of the consent decree had been fulfilled, and the consent decree protection no longer applied. MSD argued that it was protected by the decree until the plant came into compliance <u>at full capacity</u>, even though the capacity was never mentioned in the decree. (A.K. p.B.13) The Western District of Kentucky

disagreed and terminated the decree. This ended MSD's protection against enforcement actions.

The Sixth Circuit agreed with the district court upholding its decision and noting of MSD's argument:

> "Under MSD's proposed analysis of the consent decree, the purpose of the decree would not be achieved, so that it must remain enforced until additional measures are taken. Presumably, in the interim, MSD could continue to take on more and more customers thus making the effluent requirements harder to attain." (A.K. p.B.16)

The Sixth Circuit affirmed the district court in finding that the purpose of the decree was to bring MSD into compliance with the law. The Sixth Circuit also noted that there was no indication in the consent decree that compliance, only while processing 105 million gallons of sewage per day was required. (A.K.

p.B.17) MSD has now petitioned this Court to review the decision.

The Commonwealth of Kentucky disagrees with some of the factual statements made by MSD in its statement of the case. For example, the Commonwealth disagrees that under the consent decree the EPA was required to fund all remedial work necessary to correct the defects at the Morris Forman Treatment Plant. However, even given the liberties that MSD has taken with the facts, accepting what MSD says is true, it is clear, from MSD's own brief, that review should not be granted in this matter.

REASONS FOR DENYING REVIEW

THERE ARE NO SPECIAL OR IMPORTANT REASONS TO GRANT THE WRIT.

There are several basic reasons why review should not be granted in this matter.

1. The case is fact specific, and this Court is not a fact finder.

2. This case will have no impact on general federal law, either on federal constitutional law or on any interpretation of the Clean Water Act.

3. The lower Court's decision is in keeping with the basic principles of public policy.

ARGUMENT

Rule 10 of the Supreme Court Rules states:

> "A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only when there are special and important reasons therefor."

Even a cursory reading of the Petition will reveal that the reasons for review given by the Petitioner are very fact specific. On page 15 of the Petition, the Petitioner states, "the question is whether or not all of those conditions of the consent decree were fulfilled, thereby justifying its termination." The Petitioner also notes in the Petition that the issues focus upon the interpretation to be given a consent decree. These are not important federal issues. They are not issues that are special or important to the United States and its citizens. These issues may be important to the Louisville and Jefferson County Metropolitan Sewer District, but the consent decree itself is somewhat unique and questions of its interpretation are purely questions of fact. As this Court is previously noted:

> "A court of law, such as this Court is, rather than a court for correction of errors in factfinding, cannot undertake to review concurrent findings of fact by two court below in the absence of some very obvious or exceptional showing of error." *Graver Tank & Mfg. Co., Inc. v. Linde Air Products Co.*, 336 U.S. 271,275 (1949). See also *Goodman v. Lukens Steel Co.*, 482 U.S. 656 at page 665.

In addition, this case will have no impact on general federal law. As you read the Petition, it is obvious that no constitutional questions have been raised. No questions concerning the interpretation of the Clean Water Act, 33 U.S.C. §1251 *et seq* have been raised, either. We are dealing with the interpretation of one consent decree involving three governmental entities.

Supreme Court Rule 10 notes that special or important reasons may include conflicts among the various appellate courts of this nation or conflicts

between the lower court decision and the applicable decisions of this Supreme Court. These reasons are not present here nor has it been argued that they are. In *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955), this Court discussed some of the considerations utilized in granting a Petition for Writ of Certiorari. The Court stated that it does not sit to satisfy scholarly interest or for the benefits for particular litigants. *Id.* at 74. This Court is looking for cases that have national impact and this case has none. While it may be possible that someday, somehow, similar issues based on a similar consent decree might come up among similar parties, this Court can read the statement of the case, and see that it involves one consent decree involving one plant in one city. It is unlikely that the issues raised on this

appeal would come up again, and if they did, perhaps in one or two more cities, the issue is still far from being "special" or "important" enough to merit review by this Court.

Finally, the lower courts have made their decision in keeping with the broad principles of public policy and there is no reason to set those decisions aside. The Western District of Kentucky did not abuse its discretion in terminating this consent decree. A consent decree is in essence and in the nature of equitable relief. See *Williams v. Vukovich*, 720 F.2d 909 (6th Cir. 1983) where the Sixth Circuit stated:

> "Once approved, the prospective provisions of the consent decree operate as an injunction. *Id.* at 920."

The proper standard for review of matters like this in the circuit courts is the "abuse of discretion" standard. See

Heath v. De Courcy, 888 F.2d 1105 (6th Cir. 1989). The Sixth Circuit in *Heath* has disguinished between those consent decrees that are entered into by private parties (*See Id.* at 1109) and those that involve institutions and a form of institutions where a more flexible approach is favored (*See Id.* at 1109). In essence, this decree between governmental entities was an attempt at the reform of the institution of a sewage treatment plant owned by the public and operated in the public's interest, and therefore should fall under the *Heath* standard. The trial judge should be given wide latitude in attempting to seek a solution that meets the interest of the public. These are public entities litigating with each other. The Western District of Kentucky, as affirmed by the Sixth Circuit, was a wisely fashioned remedy that would promote the interest of

the people of Kentucky and of all other states down along the Ohio River. There is no special or important reason to determine whether or not the District Court abused its discretion in terminating the consent decree and deciding this case, but it is submitted that the Sixth Circuit Court of Appeals has taken that action already and upheld the decision.

CONCLUSION

There are no special and important reasons to review this case. For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

BRENDA GAIL LOWE
Commonwealth of Kentucky
Natural Resources and
Environmental Protection Cabinet
Department of Law
Fifth Floor, Capital Plaza Tower
Frankfort, Kentucky 40601
(502)564-5576

COUNSEL FOR RESPONDENT

PROOF OF SERVICE

I, Brenda Gail Lowe, counsel for Respondent, Commonwealth of Kentucky herein, hereby certify that on the 4th day of May, 1993 I served the Petitioner, Louisville and Jefferson County Metropolitan Sewer District and Respondents with a Brief for the Respondent Kentucky in Opposition to the Petition for Writ of Certiorari by placing three copies of the same in the United States mail first class postage pre-paid and addressed to Laurence J. Zielke, Esq., Pedley, Ross, Zielke, Gordinier & Porter, 1150 Starks Building, Louisville, Kentucky 40202, (502)589-4600; for service on the United States of America, Solicitor General, Department of Justice, Washington, D.C. 20530, and Winston E. King, Esq., Counsel for City of Louisville, Assistant Director of Law, Room 200, 601 W. Jefferson St.,

Louisville, Kentucky 40202, (502)625-2589, courtesy copies provided to the Office of the United States Attorney, Bank of Louisville Bldg., Tenth Floor, 510 West Broadway, Louisville, Kentucky 40202, (502)582-5911 and Peter A. Appel, Esq., Environmental Enforcement Section, United States Department of Justice, P.O. Box 23795, L'ENFANT Plaza Station Washington, D.C. 20026, (202)514-2774.

Brenda G. Lowe

BRENDA GAIL LOWE

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APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

UNITED STATES OF AMERICA
Plaintiff

and

CITY OF LOUISVILLE
Intervening Plaintiff

v. No. C 78-0130-L(b)

LOUISVILLE AND JEFFERSON COUNTY
METROPOLITAN SEWER DISTRICT and
COMMONWEALTH OF KENTUCKY
Defendants

MEMORANDUM

This matter is before the Court on the motions of the defendant, Louisville and Jefferson County Metropolitan Sewer District (MSD), and the intervening plaintiff, City of Louisville (City), for reconsideration of the Court's Order of July 3, 1991 terminating a Consent Decree. The Consent Decree was entered as a final judgment on November 24, 1981.

The Environmental Protection Agency (EPA) brought this action in April, 1978,

seeking civil penalties against MSD for violations of effluent limits imposed by National Pollution Discharge Elimination System (NPDES) Permit No. KY 0022411 at the Morris Forman Wastewater Treatment Plant (MFWTP). Title 33 U.S.C. §1342. The NPDES permit had been issued to MFWTP in 1977 pursuant to the provisions of the Federal Water Pollution Control Act (the Clean Water Act).[1] Title 33 U.S.C. Sections 1251 *et seq.* Prior to the execution of the Consent Decree, the EPA and MSD entered into a Memorandum of Understanding (MOU) in which the parties stated their intention to resolve the litigation and discussed the provisions subsequently embodied in the Consent Decree.

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[1]NPDES permits are valid for no more than five years.

MSD stipulated that it had violated the permit. The Consent Decree provided that MSD would initiate an Interim Corrective Action Program (ICAP) and an Evaluation Program (EP) as the first steps of a "phased approach" to bring MFWTP into compliance with "applicable effluent limitations." Pursuant to those programs MSD was to implement limited improvements to the MFWTP and evaluate the operation of the facility, using certain tests outlined in Appendix A to the Consent Decree. MSD was to submit to EPA written notification of each corrective action indicated as necessary during the evaluation period and state whether the action constituted a major modification, a minor modification or an operational improvement. MSD was also to submit a "final design report identifying the performance improvements of minor modifications and operational improve-

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ments, and the cost effectiveness of major physical modifications that may improve the performance of the final settling tanks," along with a summary report of the test results. Similarly, MSD was to initiate and complete a performance test of the oxygen dissolution capacity of the UNOX reactors and equipment and submit a summary report along with recommendations for "any required structural/equipment modifications." After completion of the ICAP and the EP, MSD was to complete a cost effectiveness analysis of any major modifications and then submit a Final Plan and Schedule (FP&S) "for achieving compliance with all applicable effluent limitations" to the EPA for its approval. According to the terms of the Consent Decree, MSD was to carryout the FP&S only after i approval b/ EPA.

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Section V of the Consent Decree providing for MSD's interim compliance states in pertinent part:

> (B) The parties recognize that MSD's current NPDES permit is scheduled to expire on June 30, 1982. It is the intent of the parties that in the NPDES permit renewal process for the [MFWTP] the terms of this Consent Decree shall be taken into account and that, to the extent permitted by law, the [EPA] shall propose a renewed permit, the terms of which are not inconsistent with those of this Decree.[2]

Section VII provides:

> The parties have agreed that certain elements of the current Corrective Action Program are eligible for federal funding under the provisions of the Federal Water Pollution Control Act, as amended; that they disagree as to the eligibility of other elements of the program and that these elements will be the subject of an appeal as provided for under Subpart J, Part 30 of Title 40

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[2]MFWTP's permit was renewed and the renewed permit expired in 1987. As of 1990, MSD was still operating under the expired permit.

> of the Code of Federal Regulations; and that other elements of the program will be eligible for federal funding if they are found to be necessary under the Interim Corrective Action and Evaluation Program ...[3]

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[3]The MOU separated into four categories the items in MSD's Revised Corrective Action Program for which funding was sought. The UNOX reactor was included in Category C:

> "Those items which EPA believes to be grant eligible, but for which EPA questions the necessity pending the evaluations noted above in Section III. The parties agree that should the evaluations indicate that these items are necessary to meet applicable effluent limitations, EPA will fund them promptly, contingent upon the availability of federal funds."

Finally, the Consent Decree provides that the Court will retain jurisdiction "for such further orders as may be necessary or appropriate for the construction or implementation of this Decree or for the enforcement or compliance therewith" and that the Decree "shall terminate upon application of the parties."

On June 10, 1983, MSD submitted the FP&S to EPA for approval and funding. The FP&S provided for the addition of a UNOX Battery ("Battery D" or "UNOX") to the MFWTP. In March, 1985, EPA informed MSD that it "was not convinced" of the necessity for Battery D and that its eligibility would not be considered "unless its need is demonstrated after other phases are completed." In response, MSD retained Camp, Dresser & McKee, Inc. (CDM), specialists in sewer plant design, construction and operation

to evaluate the need for Battery D. In June, 1985, CDM's report, supporting MSD's position, was submitted to EPA. In August, 1985, EPA notified MSD that it had "considerable doubt" as to the necessity of Battery D and that it believed compliance with effluent limits could be met with the items already funded. However, EPA added that it might reconsider its decision if the funded items did not bring MFWTP in compliance. In November, 1988, while the renewed NPDES permit was still in effect for MFWTP, MSD received a letter from the EPA stating:

> [T] Final Plan and Schedule (FPS) developed under Grant No. C210553-03 was conditionally accepted by EPA, but never officially approved.... Since EPA's initial receipt and review of the FPS, the proposed option to increase the capacity of unit processes in the plant has been implemented in accordance with EPA comments. The implemented plan is providing wastewater treatment in accordance with the limits of the NPDES permit. Therefore, this

letter constitutes EPA approval of the Final Plan and Schedule.

Only July 20, 1989, Russell Wright, an EPA representative, contacted William Gatewood, Manager of the Construction Grants Branch of the Division of Water for the Kentucky Department of Natural Resources and Environmental Protection Cabinet (KNREPC). Wright informed Gatewood of a June 29th meeting with MSD in which the EPA and the Kentucky Division of Water agreed to MSD's request for a "reevaluation of their proposed project of adding another unox oxygenation battery, known as Battery D, to their existing plant." (Emphasis added).[4]

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[4]During this time, EPA was delegating responsibility for wastewater regulations to the State and a new discharge permit had been proposed for

On November 6, 1989, MSD contacted KNREPC to set up a time to discuss issues related to "remaining aspects of the Final Plan and Schedule Construction Projects," including Battery D. In the letter, MSD stated that all necessary improvements to the MFWTP had been implemented or were currently under construction except for Battery D. MSD also noted that MSD's service area was expanding, "additional sludge flows were not included or anticipated in the development of the FP& S" and that the proposed NPDES permit "includes additional effluent criteria" not

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MFWTP by KNREPC. The proposed permit contained stricter effluent limitations. MSD asserted to KNREPC that it would not be able to meet the more stringent standards in the proposed permit without the addition of Battery D.

provided for or anticipated in the FP&S.

On July 17, 1990, the United States, on behalf of the EPA and joined by the Commonwealth of Kentucky, filed a motion to terminate the Consent Decree on the basis of MSD's compliance with its NPDES permit from 1986 through 1990. On August 17, 1990, MSD submitted to KNREPC for approval a design for bioroughing towers to be constructed at MFWTP in lieu of Battery D and on October 1, 1990, EPA notified MSD that a federal grant for the bioroughing towers had been approved. On July 3, 1991, this Court terminated the Consent Decree, finding that the underlying purpose of the Decree had been satisfied.

The parties agree that a Consent Decree must remain in effect so long as its continued enforcement is necessary to effectuate its purposes. The purpose of the Consent Decree in the case at hand

was to bring MFWTP into compliance with the law.[5] The parties' argument over when the Consent Decree may properly terminate stems from conflicting interpretations of critical terms of the Decree. MSD argues that all the work identified in the FP&S has not been completed and therefore, the Consent Decree may not be terminated. The United States argues that MFWTP's

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[5]"That authority of a federal district court to adopt a consent decree comes only from the statute which the decree is intended to enforce. If there is a 'purpose' to be effectuated, it is the purpose of the stature pursuant to which the government seeks relief. Within that framework the parties strike their bargain." *United States v. Motor Vehicle Manufacturers Assoc. of the United States*, 643 F.2d 644, 650 (9th Cir. 1981).

compliance with effluent limitations at any stage of major modifications, set forth in the FP&S and approved by EPA, required termination of the Consent Decree.

Consent decrees have been recognized as having attributes of both contracts and judicial acts. *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236 n. 10, 95 S.Ct. 926, 934 n. 10, 43 L.Ed.2d 148 (1975); *United States v. Armour & Co.*, 402 U.S. 673, 681-82, 91 S.Ct. 1752, 1757, 29 L.Ed.2d 256 (1971). Principles of contract law are used for purposes of interpreting the meaning of a consent decree. Only when the language of a consent decree is not clear on its face, have courts been forced to resort to equitable considerations to define the limits of a consent decree. *Chrysler Corp. v. United States*, 316 U.S. 556, 62 S.Ct. 1146, 86 L.Ed. 1668 (1942).

We find that the language of the decree is quite clear and that its purposes have been accomplished.

Appendix A of the Consent Decree provides for MSD to undertake a series of interim steps to determine whether limited improvements would bring about compliance with "applicable effluent limitations." A cost effectiveness analysis of suggested major plant modifications was to be implemented in the event that the interim steps did not result in compliance and only then was the FP&S to be developed by MSD. Nothing in the language of the Consent Decree or the Memorandum of Understanding compels the conclusion that the EPA was required to approve the entire FP&S as initially submitted by MSD. It appears from the face of the Consent Decree that MSD's requirement to implement any of the FP&S was contingent on EPA's approval of any

part of the FP&S. The record shows that MSD formally approved the FP&S and found MSD to be in compliance with "applicable effluent limitations" in November of 1988. MSD does not deny that it was in compliance with the renewed NPDES permit in November of 1988 and it had been in compliance until 1990. Therefore, the duties of EPA and MSD under the terms of the Consent Decree ended as of November, 1988. The July 20th, 1989, letter to KNREPC from the EPA does not suggest that the EPA changed its position as to the requirements of the Consent Decree.

In addition, Section V of the Consent Decree contemplates that the "applicable effluent limitations" referred to throughout the Consent Decree are those limitations imposed by the NPDES permit issued in 1977 and the

renewed permit which expired in 1987.[6] MSD requested approval of Battery D from the KNREPC based on a projected increase in effluent flow and the heightened requirements of a proposed NPDES permit.

The City and MSD argue that the Consent Decree may only be terminated on the agreement of all parties and therefore, the Court did not have jurisdiction to terminate the Consent Decree.

Section XII provides: "This Decree shall terminate upon application of the parties." This provision simply allows the parties to terminate the Decree by agreement; it does not divest the Court of jurisdiction to end the Decree upon the motion of any party and a finding that the purposes of the Decree have been fulfilled.

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[6]See footnote 2.

An appropriate order has been entered this 8th day of November, 1991.

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THOMAS A. BALLANTINE, JR.
Chief Judge, U.S. District Court

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APPENDIX B

NO. 91-6461
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

CITY OF LOUISVILLE

Intervening Plaintiff-Appellee,

v.

On Appeal from the United States
District Court for the
Western District of Kentucky

LOUISVILLE AND JEFFERSON COUNTY
METROPOLITAN SEWER DISTRICT

Defendant-Appellant,

COMMONWEALTH OF KENTUCKY,

Defendant-Appellee

Before: MERRITT, Chief Judge; and GUY and RYAN, Circuit Judges.

Ralph B. Guy, Jr., Circuit Judge. Defendant, Metropolitan Sewer District, appeals the district court's order terminating a 1981 consent decree. On appeal, defendant argues that the purpose

of the consent decree has not been achieved and therefore the court should not have terminated the decree. We agree with the district court that the purpose of the consent decree has been accomplished and therefore affirm.

I.

Louisville and Jefferson County Metropolitan Sewer District (MSD) was created pursuant to enactments of the Kentucky Legislature, Ky. Rev. Stat. §76.010, to develop and operate a sanitary and storm sewer system in Jefferson County, Kentucky. In the late 1970s, defendant contracted with Blount Brothers to build the Morris-Foreman Waste Water Treatment Plant (MFWTP), which was completed in 1974. The design plans, approved by the Environmental Protection Agency, anticipated sewage flow of 105 million gallons per day. MFWTP was issued a National Pollutant

Discharge Elimination System (NPDES) permit by the EPA in 1977 pursuant to applicable provisions of the Clean Water Act. This permit required MSD to meet specific effluent limitations for biochemical oxygen demand (BOD) and total suspended solids (TSS). Unfortunately, substantial defects in design caused the plant's effluent to exceed its permit limits. Major litigation ensued between MSD and Blount Brothers, resulting in a multi-million dollar settlement. However, MSD was still faced with a plant that was not complying with its permit requirements.

In April 1978, the EPA brought an enforcement action against MSD for violating the plant's permit. MSD faced civil penalties of $10,000 per day for violating its permit. 33 U.S.C. §1319(d) (1986). Over the next two years, the parties came to an agreement,

memorialized in a "Memorandum of Understanding," and entered into a consent decree. According to appendix A of the consent decree, MSD was to undertake two steps to bring the plant into compliance with its permit. MSD was to conduct an "Interim Corrective Action Program" to ascertain if limited improvements to the plant could bring about compliance with applicable effluent limitations and an "Evaluation Program" to determine the relative feasibility and economic efficiency of alternative improvements. If these steps showed that the MFWTP could not achieve compliance with applicable effluent limitations without major physical modifications, then MSD was to submit a "Final Plan and Schedule" detailing the major physical modifications and equipment modification required. According to the consent decree, "[u]pon approval by EPA Region

IV, MSD shall carry out that Final Plan and Schedule." (App.62). The agreement also established those items EPA would fund and would not fund, those items the parties disagreed upon funding, and those items the EPA felt were eligible for funding but would not approve unless shown to be necessary. The consent decree provides:

> Although §1319(d) of 33 U.S.C. provides that penalties may be sought for violation of applicable effluent limitations, EPA has elected not to seek such penalties in this instance in light of MSD's substantial efforts including both studies and physical work to correct the deficiencies which have prevented MFWTP from achieving applicable effluent limitations.

(App.54).

MSD proceeded to undertake the actions required by the consent decree, completing the Interim Corrective Action Program and Evaluation Program. The Final Plan and Schedule was submitted to the EPA in 1984. One item MSD felt was

needed was an additional UNOX reactor, also referred to as Battery D. The EPA disagreed with the necessity of this item. In 1985, the EPA approved the Final Plan and Schedule, except for the additional UNOX reactor.

While the various studies were being conducted, events were changing the volume and quality of the sewage coming into the plant. In 1981, a substantial portion of MSD's sewer system was destroyed by a series of explosions. Additionally, industrial sewage began to diminish in the area. Carl Neumayer, the director of operations and maintenance of MSD, stated in his affidavit:

> As a result of the decrease in industrial sewage discharged into MSD's system, coupled with the Interim Corrective Actions undertaken by MSD in compliance with the Consent Decree, the quality of MSD's discharge effluent began to consistently meet the BOD and TSS effluent limitations set forth in MSD's EPA-issued discharge permit.

(App.116). The parties agree that, from 1986 until 1989 and for several months in 1990, the plant was meeting the permit requirements. In July 1990, the EPA moved for a termination of the consent decree, "certif[ying] that the defendants have fully complied with the provisions of the Consent Decree." (App.64).

In the meantime, in 1989, MSD had requested the EPA to re-evaluate the need for the additional UNOX reactor that the EPA omitted from its approval of the Final Plan and Schedule. Under the Clean Water Act, the EPA can give grants to assist the construction of wastewater treatment plants. 33 U.S.C. §1281(g) (1986 & Supp.1992). But under the complex procedures for grants, the EPA must wait until the state has certified a project and has determined that the project has priority over other works within the state. 33 U.S.C. §1284(a)(3)

(1986). On July 20, 1989, the EPA, following the established procedures for grants under the Clean Water Act, authorized the Commonwealth of Kentucky to review MSD's request for a re-evaluation of the need for the additional UNOX reactor. On August 17, 1990, after the EPA filed its motion for termination of the consent decree, MSD submitted a proposal for bioroughing towers, in lieu of UNOX reactor, to the Commonwealth of Kentucky, arguing it was required because of additional sludge flows that were not included or anticipated in the development of the Final Plan. As Carl Neumayer explained in his affidavit:

> MSD has been consistently expanding its sewer lines throughout Jefferson County in compliance with the mandate imposed by KRS 76.010 in order to accommodate area development, population expansion and public health needs. In addition, MSD has assumed responsibility for treating sewage previously treated by private package sewage treatment plants so

> as to eliminate discharge of inadequately treated sewage into Kentucky's waterways. In the last several years industrial discharges into MSD's sewer system have increased. As a result, despite MSD's application of its best efforts, the MFWTP during significant portions of 1989 and 1990 has failed to achieve the effluent limitations imposed by the EPA-issued discharged permit.

(App. 116-17). Kentucky certified the bioroughing towers on August 22, 1990, one month after the government sought to terminate the consent decree. On October 1, 1990, the EPA approved funding for the project. MSD projects the bioroughing towers' completion date to be sometime in 1995.

On July 3, 1991, the district court entered its order terminating the consent decree. After MSD moved the court to reconsider its order, the court entered its final order terminating the consent decree on November 8, 1991. MSD argued, as it does on appeal, that until the

bioroughing towers are completed the Final Plan and Schedule has not been "carried out" because the UNOX reactor (substituted with the bioroughing towers) was in MSD's proposed Final Plan. In its memorandum, the court explained:

> The parties agree that a Consent Decree must remain in effect so long as its continued enforcement is necessary to effectuate its purposes. The purpose of the Consent Decree in the case at hand was to bring MFWTP into compliance with the law.[5] The parties' argument over when the Consent Decree may properly terminate stems from conflicting interpretations of critical terms of the Decree. MSD argues that all the work identified in the FP&S has not been completed and therefore, the Consent Decree may not be terminated. The United States argues that MFWTP's compliance with effluent limitations at any state of major modifications, set forth in the FP&S and approved by EPA, require termination of the Consent Decree.
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> Consent decrees have been recognized as having attributes of both contracts and judicial acts. *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236 n. 10, 95 S.Ct. 926, 934 n. 10, 43 L.Ed.2d 148 (1975); *United States v. Armour*

& *Co.*, 402 U.S. 673, 681-82, 91 S.Ct. 1752, 1757, 29 L.Ed.2d 256 (1971). Principles of contract law are used for purposes of interpreting the meaning of a consent decree. Only when the language of a consent decree is not clear on its face, have courts been forced to resort to equitable considerations to define the limits of a consent decree. *Chrysler Corp. v. United States*, 316 U.S. 556, 62 S.Ct. 1146, 86 L.Ed. 1668 (1942).

We find the language of the decree is quite clear and that its purposes have been accomplished.

Appendix A of the Consent Decree provides for MSD to undertake a series of interim steps to determine whether limited improvements would bring about compliance with "applicable effluent limitations." A cost effectiveness analysis of suggested major plant modifications was to be implemented in the event that the interim steps did not result in compliance and only then was the FP&S to be developed by MSD. Nothing in the language of the Consent Decree or the Memorandum of Understanding compels the conclusion that the EPA was required to approve the entire FP&S and initially submitted by MSD. It appears from the face of the Consent Decree that MSD's requirement to implement any of the FP&S was contingent on EPA's approval of any part of the FP&S. The record shows that MSD formally approved the FP&S and found MSD to

be in compliance with "applicable effluent limitations" in November of 1988. MSD does not deny that it was in compliance with the renewed NPDES permit in November of 1988 and it had been in compliance until 1990. Therefore, the duties of EPA and MSD under the terms of the Consent Decree ended as of November 1988. The July 20th, 1989, letter to KNREPC from the EPA does not suggest that the EPA changed its position as to the requirements of the Consent Decree.

In addition, Section V of the Consent Decree contemplates that the "applicable effluent limitations" referred to throughout the Consent Decree are those limitations imposed by the NPDES permit issued in 1977 and the renewed permit which expired in 1987. MSD requested approval of Battery D from the KNREPC based on a projected increase in effluent flow and the heightened requirements of a proposed NPDES permit.

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[5]"The authority of a federal district court to adopt a consent decree comes only from the statute which the decree is intended to enforce. If there is a 'purpose' to the effectuated, it is the purpose of the statute pursuant to which the government seeks relief. Within that framework the parties strike their bargain." *United States v. Motor Vehicle Manufactures Assoc. of the United States*, 643 F.2d

644,650(9th Cir. 1981).

(App. 176-178) footnote 6 omitted).

II.

On appeal, defendants dispute the governments' assertion and the district court's conclusion that the purpose of the consent decree has been met. MSD argues that the purpose of the consent decree was to bring the MFWTP into compliance with its permit limits while operating at its design capacity of 105 million gallons of sewage flow per day.

Defendant initially opposed the entering of the consent decree, taking "the position that the more appropriate means of resolving the issues would be an extension of its existing NPDES permit or an administrative order." (App. 86). Thus, we confront the facial anomaly, recognized by the district court in its memorandum and order denying defendant's request for a stay, issued July 2, 1992,

of a defendant arguing it has not completed all the requirements of the consent decree and therefore the decree should not be terminated. Normally, liability under the Clean Water Act is strict, regardless of how efficiently an individual operates a plant. *See United States v. Texas Pipeline Co.*, 611 F.2d 345 (10th Cir. 1979). Through the consent decree, defendant was allowed to avoid penalties so long as it, in good faith, used its best efforts to run the plant as efficiently as possible and take the required steps in the consent decree. Although defendant did consistently meet its permit requirements for several years in a row, it seeks to maintain the protection from the potential $25,000 a day in civil penalties until installation and testing of the bioroughing towers is

completed.[1]

Defendant argues that the only reason the plant was able to meet its permit requirements for those years was due to decrease in sewage flow and a concurrent increase in the "quality" of incoming sewage. MSD asserts that the government's position taken to the extreme is ludicrous: the plant could have met the permit requirements from day one be reducing its intake. However, MSD fails to see the parallel in its argument; taken to its extreme, MSD's position is untenable. What if the bioroughing towers fail to bring the

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[1]When this action was first brought, the civil penalties were $10,000 per day. The Clean Water Act has since been amended to provide for civil penalties up to $25,000 per day. 33 U.S.C. §1319(d) (Supp. 1992).

plant within its permit limits while operating at the design capacity? Under MSD's proposed analysis of the consent decree, the purpose of the decree would not be achieved, so it must remain in force until additional measures are taken.[2] Presumably, in the interim, MSD could continue to take no more and more customers, thus making the effluent requirements harder to attain.

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[2]"The whole purpose of the Consent Decree was to correct [the plant's] defects. It follows that until all the defects are corrected, the purpose of the Consent Decree has not been met." (Def's Brief at 16). To counteract the extremity of their position, defendant, in response to the government's motion to terminate the consent decree, moved for modification of the decree setting a date certain for its termination.

The parties agree that the consent decree should terminate when the purpose of the decree has been fulfilled. They differ significantly on what that purpose is. The "four corners" of a consent decree are examined to determine its scope. *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 574 (1984). We agree with the district court that the purpose of the consent decree was to bring the plant into compliance with the law; indeed, its violation of the law is what prompted the EPA to bring the initial enforcement action. There is no indication in the consent decree that compliance <u>while</u> processing 105 million gallons of sewage was required.

This conclusion is further bolstered by an examination of the Clean Water Act's purposes. A consent decree should be construed against the background of the statue under which the action was

brought. *Las Vegas v. Clark County*, 755 F.2d 697, 702 (9th Circ. 1985); *United States v. Motor Vehicle Mfrs. Ass'n of the United States, Inc.*, 643 F.2d 644, 650 (9th Cir. 1981). The Clean Water Act does not contemplate compliance with NPDES permit while operating at design capacity; it requires compliance with permits, period. If a plant must reduce its sewage intake to comply, then that step must be taken. Further, the NPDES permits have a duration of five years, 33 U.S.C. §1342(b)(1)(B) (1986), and, as a general rule, subsequent permits are supposed to be no less stringent than the one before it. 33 U.S.C. §(1342)(o)(1) (Supp. 1992). Through continued enforcement of the consent decree, MSD is seeking to be held to the effluent limitations of a permit issued fifteen years ago.

MSD argues that, because the

additional UNOX reactor was in MSD's original Final Plan and Schedule and that because the EPA eventually approved its construction, MSD should be allowed to complete it without the risk of civil penalties. When the parties entered into the consent decree, the additional UNOX reactor was in the category of those items that were eligible for funding but would not be funded unless their necessity was shown. It was not until after the MFWTP has been meeting its permit limits for several years that an increase in sewage quantity caused the EPA, through the Commonwealth of Kentucky, to find the additional UNOX reactor (substituted by the bioroughing towers) necessary. The 1978 consent decree's purpose was not to correct the design problems of the MFWTP for future increase sewage flow, but to correct the problems so that the then current

effluent met the permit limits. Indeed, the EPA seemed correct in its evaluation of the need for the additional UNOX reactor. The modifications the EPA approved without the UNOX reactor helped the MFWTP to finally achieve its permit limits, and to do so for several years.

Additionally, this litigation is primarily between two institutions -- the Environmental Protection Agency and the Louisville and Jefferson County Metropolitan Sewer District.[3]

> [C]onsent decrees which regulate institutional conduct are fundamentally different from consent decrees between private parties... [T]hey affect more than the rights of the immediate litigants. The decrees reach beyond the parties

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[3]Also party to this litigation are the Commonwealth of Kentucky, defendant now aligned with the plaintiff, and the City of Louisville, intervening plaintiff.

> involved directly in the suit and impact on the public's right to the sound and efficient operation of its institutions.

Heath v. De Courcy, 888 F.2d 1105, 1109 (6th Cir. 1989). Considering the public's interest in compliance with the Clean Water Act, we are not prepared to say that a plant that was able to comply with its required effluent limitations for several years should now be allowed to again violate its permit with impunity while constructing new equipment. For 11 years, MSD has been allowed to use its "best efforts" to fix the problems at the plant without the fear of stiff civil penalties, and for several years the plant was able to comply with its permit. As the district court recognized, the purpose of the consent decree was achieved.

AFFIRMED.

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Issued as Mandate 3/23/93

MERRITT, Chief Judge, dissenting. The Consent Decree is a contract between the government and the sewer district. I disagree with the Court's holding that "the purpose of the consent decree was achieved" and that the decree should, therefore, be terminated. The "effluent limitations" were met for only a short period at very low levels of discharge. The sewer district is not building two oxygenation towers to correct the problem. This work will cause part of the plant to remain shut down until completion. These additions are the type of improvements contemplated in the decree. The decree was entered to give the sewer district a change to make such improvements. While this new construction is going on, the plant cannot meet effluent limitations.

Although the agreement is more than a decade old, the plant cannot meed the standards in the part because the EPA did not authorize construction of the new towers until 1990.

There is no suggestion in the record that the district has not done everything it can under the consent decree to comply with the effluent standards. The sewer district advised EPA years ago that the towers would be needed, but EPA disapproved until two years ago. With construction incomplete, why should the decree end now? Why now subject the district to another lawsuit and to $25,000 a day in penalties. If the district is breaching the decree, it should be required to comply, but there is no such claim. And there is no claim that the plant has ever met effluent limitations at its design capacity or at its present levels of effluent discharge.

It may be administratively more convenient for EPA to have the agreement terminated now. It may be unfair to some cities which have no comparable agreement to require them to pay penalties when they fail to meet effluent limitations. It may be that EPA made a bad deal when it signed this consent decree. But none of these are reasons which justify termination of the settlement agreement. The only reason the government gives as a justification for seeking termination -- "the purpose of the decree has been satisfied" --is simply not the case. There may be other reasons to terminate the agreement, but this one is a legal fiction. It sets a bad precedent to allow the contract to be set aside on this basis. I would not simply defer to the government in such matters of contract construction and enforcement.

The government is, after all, a party to the contract.

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